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ABSTRACT

This discussion addresses the legal issues in special education currently of critical concern to school administrators. It reviews outcomes of recent court cases, Department of Education policies, and legislative requirements concerning the following issues: (1) inclusion (a two-pronged test of compliance with mainstreaming requirements of the Individuals with Disabilities Education Act is explained); (2) medically fragile students (court decisions on determining whether required services are educational or medical in nature are reviewed); (3) violence, discipline, and expulsion (the Relationship Test of whether the misbehavior is related to the student's disability is explained); (4) parent unilateral placement in a private school (differing standards for determining whether a public school program is appropriate are noted); (5) services to students in parochial schools (explains the Supreme Court decision in the Zobrest vs Catalina Foothills School District case). (DB)

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ED 372 568

SPECIAL EDUCATION ADMINISTRATOR ISSUES AND THE LAW

CEC - Denver, Colorado
4:45 - 5:45 Friday, April 8
Room 205A

We have only a limited amount of time to discuss a wealth of issues so I have tried to prioritize the issues I think are most critical to us as administrators. I am definitely not a lawyer but, fortunately, Reed Martin is and is here with us to assist me in answering questions at the end of my presentation.

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INCLUSION

Inclusion is a topic causing significant difficulties in some areas.

First, you should be aware that the federal Department of Education has taken a strong stand on this issue in favor of inclusive programming. The Executive Branch has made the rather unusual step of making a statement of policy through affirmation of court decisions. The two cases which the Department is quoting are the Oberti case and the amicus curiae brief filed by the Department in the Rachel Holland case in Sacramento.

Let me take just a moment to do a brief review for you of these two in case you have forgotten them or are confused as to their findings. The Oberti case, as you know is over. The deadline for appeal has passed and an appeal was not filed. The result is that if the parents of Rafael Oberti decide to enroll him in the Clementon school district the school district must try to educate the eight-year-old child with Downs Syndrome in the regular classroom with supplementary aids and services.

The third Circuit ruled that the IDEA prefers mainstreaming where possible and the school must attempt to educate Rafael in that manner. The court rejected the school district's position that Rafael would be too disruptive to teach in a regular classroom because of his behavior in kindergarten two years earlier. Without an attempt to place the child in the regular classroom, the school district could not prove Rafael could not be educated in a regular classroom.

The case of Rachel Holland, Board of Education of Sacramento Unified School District v. Holland, was appealed in the Ninth Circuit Court of Appeals in San Francisco. Rachel is an 11 year old girl who is described as "significantly" retarded, with an I.Q. of 44. It was this case in which the Department of Education filed an amicus curiae brief in support of the Hollands.

Judgements in both the Oberti and the Holland cases involve use of a two pronged test for determining whether a school is in compliance with IDEA's mainstreaming

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requirement that was established in the 1989 case, Daniel R.R. v. State Board of Education. The first prong of this test involves determination of whether education in the regular classroom, with the use of supplementary aids and services, can be satisfactorily achieved for a particular child with disabilities. In this determination, say the courts, three factors should be considered. 1) whether the school district has made reasonable efforts to accommodate the child in a regular classroom; 2) the educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and 3) the possible negative effects of the inclusion of the child on the education of other students in the class. In examining the second factor, that of probably benefit, it is important to note that in the Holland case the issue of whether academic achievement is more important than social development and communication skills must be decided in the IEP. In Rachel's case the court determined that the fact that she would receive greater social and communication skill development in the regular classroom outweighed the fact that she would probably make less academic gain.

The second prong of this test applies only if it is found, via the first prong and its three factors, that the school district is justified in removing the child from the regular education classroom and providing education in a segregated, special education classroom. Then determination must be made as to whether the school has included the child in school programs with non-disabled peers to the maximum extent possible.

So what does that mean for us as administrators? First, I think it is important for you to be really familiar with that two pronged test and to use it in all your decision making regarding placements. Next, I think it means that, particularly for younger children, you are on very shaky ground if you determine that a child cannot benefit from placement in the regular classroom if you have not tried it. Particularly, of course, if the parents are requesting regular class placement. Remember, also, the lesson of the Oberti case - because you tried it two years ago and it didn't work does not mean that it could not work this year or today. It must be a recent try.

MEDICALLY FRAGILE

The difficulty administrators face in the delivery of services to students who are medically fragile is two fold. First, there is often an issue regarding whether the required services are educational in nature and, thus, covered by IDEA, or whether they are essentially medical in nature and hence excluded from coverage under IDEA. There was an interesting case in Utah which was decided last year and which I think illustrates some of the complexities of these cases.

Shannon M. was a student who began in the Granite School District in Utah in half day kindergarten. Shannon is a child with congenital neuromuscular atrophy, severe scoliosis, and is confined to a wheelchair. She has a "Do Not Resuscitate" order. Shannon had

normal intelligence and did not require special education services at that time. She subsequently did require special education because of her need for resource programming, adaptive P.E., and physical and occupational therapy.

From the beginning of her schooling Shannon required full time nursing because she requires constant monitoring; is life dependent on trained personnel regularly suctioning her tracheotomy tube; need for a portable ventilator; positioning; and food, water and medication administered through a nasogastric tube. When Shannon began school she received full time nursing services through an insurance company paid through the father's employment until December of 1989, when the service was reduced. Shannon's mother provided the services at school, but then began schooling of her own, and requested Granite School District to provide the services so Shannon could remain in school (still in kindergarten.) Shannon's mother then requested that the school provide the nursing services. In response to a request from the district, Shannon's physician said an RN or LPN was required to provide the correct level of service. Granite refused to provide the service on the grounds that it was medical, not educational. The district said she could receive appropriate educational services through home instruction.

When Mrs. M. was no longer providing the services, Shannon attended school two days a week with Home Health Care nurses (from the State Department of Health), while Granite provided home tutoring on the other three days.

Parents filed, and a due process hearing was conducted in June, 1990. The hearing officer issued a decision that Granite was required to provide the full-time- in-school nursing care requested. He felt an aide could be properly trained to perform the services. (Shannon was to enter first grade full time in the fall of 1990).

In July, 1990, Granite requested an impartial review from the state level panel. In August of 1990, the panel affirmed the hearing officer's decision. The Utah Nurse Practice Act specified that the services needed by Shannon were to be provided by a licensed nurse. Granite District used the 1990 CEC document, Guidelines for the Delineation of Roles and Responsibilities for the Safe Delivery of Specialized Health Care in the Educational Setting, as a guide for appropriate services. It was estimated that the cost of an LPN would be approximately $30,000 per school year.

Granite District filed in federal court (Third District) to have the decision overturned. Judge David Sam concluded that Federal law does not compel Granite to provide full time nursing care to Shannon, and also denied the attorney's fees which had been requested.

In his finding, Judge Sam stated that the basic floor of opportunity had been provided, since she received sufficient educational benefit from the instruction provided. He also found that since Granite had only three school nurses to serve 75,000 students, they would not be available to provide Shannon with constant care.

He found that the cost of $30,000 expenditure would take money away from other programs, and found that she could not be mainstreamed satisfactorily. His decision was based on the medical services exclusion of IDEA.

It is interesting to note a comment made by the court: "The court acknowledges the good faith and desire of all parties to secure for Shannon M. the proper care and most appropriate education possible under the relevant facts and law. That this common desire has led to differences in opinion as to that care and education, speaks no less highly of the concern exhibited by all involved. The court wishes to compliment the parties and counsel for the professional and caring way in which this matter has been presented to the court."

There are a number of other cases which have been heard which deal with this same issue. Some which may be helpful to you are:

Tatro - 468 U.S. 883 (Supreme Court Reporter) a student who required intermittent care from a lay person, had spina bifida - would soon be able to care for self.

Bevin - 66 F.Supp. 71 (District Court) Required constant undivided attention of a nurse, Robinow syndrome, severe brocho-pulmonary dyslalia, spastic quadriplegia, seizure disorder and hydrocephalus. Life dependent on regular suctioning. Needs gastrostomy tube care, oxygen and positioning. Services cost $16,600 for 9 months. Court ruled too costly.

Detsel, 820 F2nd 587 and 637 F.Supp. 1023 (District and Appellate). Required constant care from a licensed practical nurse, severe physical disabilities, life dependent on trained person regularly suctioning and monitoring. Needs jejunum tube care, saline solution, respirator and striking of lungs. Cost of full time nurse care not given. Court ruled too costly.

Katherine D. 727 F.2nd 809 - requires intermittent care from lay person. Has cystic fibrosis and tracheomalicia. Intermittent care only.

Macomb 715 F.Supp. 824 - Severely multiply impaired. Requires twice daily care on bus. By state law, not eligible for homebound education. Potential need for care during transportation. Court ruled an absolute right to everything short of physician services regardless of cost.

VIOLENCE - DISCIPLINE - EXPULSION

When we are considering expulsion or suspension of a student with disabilities we use what has come to be called the Relationship Test. Records of administrative hearings and

court cases involving the expulsion of disabled students characteristically discuss what has become known as The Relationship Test. The RT is stated in various terms but generally speaks to an inquiry into whether or not a misbehavior which warrants punishment is related to - or is a manifestation of - a student's disability.

There is nothing called a Relationship Test in federal statute or regulation although there is in some state regulations. Sorenson, in The Education Law Reporter in 1993, suggests that it comes from the traditional principle in Anglo-American law that punishment should be attached to the notion of fault - e.g., justifiable homicide is the idea that it wasn't really their fault even though the person committed the crime.

The RT was first used in 504 cases, not IDEA. First, please understand that no one knows how to conduct a RT so if you feel uncertain about it you are on target - have a clear understanding of the problem - and have lots of company. There are, however, some hints. 1) It must involve a new inquiry for each situation based upon fresh evaluation data for that child. 2) The inquiry should be independent of the student's disability category, e.g. when a student with mental retardation acts emotionally disturbed it cannot be assumed that they are necessarily displaying behavior that is not related to their disability. 3) It is not a question of whether the student knew the difference between right and wrong. 4) There may also need to be a consideration of direct vs. attenuated relationship, e.g., a student with an orthopedic disability might be more aggressive toward other children as an outcome of frustration and feelings of physical vulnerability. Note that I said this may need to be a consideration - not all the Circuit Courts have agreed with the notion of attenuated relationship. States vary widely in the language they have selected in establishing the relationship. You will need to check your own state regulations and language on this one.

Some writer would argue that the basis for the RT comes from 504 rather than IDEA and that the courts who have ruled it as an IDEA issue have promoted the merging of Section 504 anti-discrimination provisions with IDEA mandatory services provisions. As administrators that point may be a moot one as we are operating both anyway. Still, I think it is important to have the distinction clear in our own minds as there could be instances in which it affects procedure.

In addition to the so-called RT is the concept of appropriateness of placement. In other words, it is possible that the problem is a failure of placement - would a different or more restrictive placement mitigate the problem? Additionally, it is important to remember that failure to follow procedures will speak to the propriety of the placement in the view of the courts.

Not yet properly addressed by the courts is the question of expulsion of students who are 504 but not IDEA eligible. Which raises an interesting question - is it possible that a student is no longer 504 eligible if the accommodation is no longer reasonable?

The new issue for all of us in this category is students with truly violent behavior. I think that all of us know that when this language was framed our concern was students who did not follow school rules, who talked back to teachers, who used obscene language, got into fights on the playground, etc. We were not, in the 70s dealing much with drive by shootings, out of control gang warfare, significant numbers of firearms, and the other manifestations of violence that are the daily fare of urban secondary schools today. Indeed, what we told teachers and principals in those days was: if such a situation arises, call the police and let the justice system deal with it. What those of you in urban settings know is that that is no longer a satisfactory answer because the justice system is not dealing with it and those students are back on the streets almost immediately.

I think we have strong, although at this point informal, support from Tom Hehir at OSEP that it is not the intention of IDEA that students who really present a danger to themselves or to other students or adults, remain on a campus. More and more schools are adopting a Zero Tolerance policy toward weapons and I think they can make it stick. That does not mean, however, that we can cease educational services. Nor, as a society, should we want to. Those students are going to become adults and all of us are better off if they are educated adults. Many urban systems are developing alternative programs where such students can receive educational programs. In other instances, where appropriate for the student or where no alternative program exists, districts are using homebound services. No one has yet resolved the issue of how much educational service is needed to meet the requirements and intent of the law but as Reed and I were discussing earlier in the week you can certainly make the argument that intensive one on one instruction can delivery a given amount of service in a shorter period of time than in a classroom of 30 some students.

Obviously, what I am talking about is a short term solution. We need long term solutions to this issue and I want to take just a second to tell you what CASE is doing to try to address the issue. First, we are collaborating with the Secondary School Principals to make available a master directory of conferences, teleconferences, publications, and other media materials available on the issue which are currently being sponsored or published or used by a wide range of professional associations. We think it will be a very meaningful resource. Second, we will be working with CEC on the re-authorization of IDEA to see whether we can develop some language which will still protect student's rights but will also protect the rights of non-disabled students and of school staffs. Third, we are working to develop dialogues with the juvenile justice system to seek ways in which we can more collaboratively address the problem. And, fourth, we will continue to try to make materials and resources available to you which will better equip our teachers to deal with aggressive behavior. While I think there is no question that the source of the problem is not the schools, it is our society, it is also true that it is in the schools where the problem must be confronted and therefore, I would suggest, it is we who must take the lead in bringing together parents, communities, juvenile justice systems, social agencies and the schools to address the problem.

Back to the Law:

PARENT UNILATERAL PLACEMENT IN PRIVATE SCHOOL

In Burlington vs. the Board of Education in Massachusetts in 1985 the Supreme Court held that under certain circumstances public schools must reimburse parents for private education expenses even when parents place unilaterally IF the placement were ultimately found to be appropriate.

That helped to clarify unilateral placement in approved programs but still left a lack of clarity in non-approved programs. In Tucker, an LD kid in 1984, the Appellate Court in the 2nd Circuit said IDEA does not permit reimbursement for parents' unilateral placement of a disabled child in an unapproved school.

So - we thought that was clear and went our merry way until Carter vs Florence County School District in the 4th Circuit and ultimately the Supreme Court. The issue raised in this case was that while public agencies could not place in unapproved schools, parents could. The 4th Circuit granted reimbursement to the parents and this split between the 2nd and 4th Circuits is undoubtedly a major factor in why the Supreme Court agreed to hear the case. As you already know, the Supreme Court, Justice O'Connor writing for the majority, upheld the 4th Circuit.

The key in Carter is that the courts did not find the program offered by the LEA to be appropriate. In fact, there was a period of some years during which the district could have made other program offers but they did not so do. Second, know what your state approval process is - it would certainly seem that a case by case decision making process for approval for private schools was problematic in this case and probably appropriately so. I think that one of the concerns in Carter is that the private school in question did not provide IEPs and the Court, in its decision, made no reference to IEPs. Because the IEP is so fundamental to our decision making process I think that is problematic. I don't think that the Carter case is one to be unduly concerned about but, at the same time, it does have some lessons for us.

The most important isn't new to you - be proactive! Keep talking! Keep making appropriate offers and act in good faith. If a parent takes a youngster out after alleging that the program you have offered is not appropriate - keep talking, keep making program offers and keep a record! You can significantly alter the final outcome of potential litigation if you follow those really simple rules. You know the rule - they may go off in a huff but as the administrator you aren't allowed to so don't indulge.

Lets close with a related issue:

SERVICES TO STUDENTS IN PAROCHIAL SCHOOLS

IDEA says LEAs must provide special education and related services to students in private schools. The regulations say:

> "If a child with a disability is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall:
>
> a) Initiate and conduct meetings to develop, review, and revise, an IEP for the child in accordance with these regulations."

In 1985 the U.S. Supreme Court held that Chapter 1 remedial services could not be provided on the premises of a parochial school. The case was Aguilar vs Felton.

We in Special Education have typically followed those guidelines. As recently as 1991 in Goodall vs Stafford County School Board in Virginia the 4th Circuit Court of Appeals upheld that view and cited a long string of various services to parochial school students. Then came Zobrest in Arizona!

The case became important to the rest of us when the 9th Circuit Court of Appeals evaluated the constitutionality of a government-paid sign language interpreter under the test articulated in Lemon vs. Kutzman. That test sets forth 3 requirements: 1) The statute in question must have a secular purpose 2) its primary effect must be neutral, ie neither advancing nor inhibiting religion, and 3) it must not foster excessive government entanglement with region. The Court upheld the lower court and the schools and said that the case failed the Lemon test because the interpreter would be conveying a religious message and experience and that to monitor to be sure that the interpreter was only interpreting secular material would be problematic. We all thought that was clear but then the parents appealed to the Supreme Court.

The Supreme Court ruled in June, 1993 that the Establishment Clause of the U.S. Constitution does not preclude the public financing of a sign language interpreter at a sectarian school for a student with a profound hearing impairment. In a 5-4 ruling in Zobrest vs Catalina Foothills School District, the Court narrowed the separation of church and state in public school matters. The ruling is highly fact specific and whether it will prove to be of great magnitude remains to be seen.

Chief Justice Rehnquist authored the majority opinion. The Court analogized the case to others allowing religious institutions to receive general governmental benefits such as the protections of police and fire departments. They noted that the aid was ultimately teaching the institution "only as a result of the genuinely independent and private choices of aid recipients" and was not of benefit to the institution. Further the Court differentiated the task of a sign language interpreter from that of a teacher of guidance counselor and said that the interpreter is to accurately interpret whatever material is

presented and"will neither add nor subtract from the sectarian environment." The Supreme Court did not mention the Lemon test in its ruling.

The Court did specify that IDEA was not a religiously motivated program and also said that paying for an interpreter would not have the effect of promoting religion. The 3rd issue in Lemon, of entanglement of church and state is absent from the opinion. The majority seemed to be relying heavily on what has been called the Child Benefit Theory - in which allowable services are those that tend to benefit the individual child without providing any direct financial subsidy to the parochial school. For example, in earlier cases it has been established that the public school may need to provide transportation for the child from the parochial school to a public setting and back in order for the child to received allowable services.

Note that the Court ruled only on the constitutionality of the provision of the interpreter services and not on whether IDEA establishes an entitlement to services on parochial school sites. That issue has not really been resolved by the Court.

Zobrest, as I said earlier, was a narrow decision by a narrow margin and the loss of one vote from the majority would have changed the outcome. While the Court did not rely on the Lemon test it did not produce a new test for us to use nor totally abandon the reasoning of Lemon. Also, the complexion of the Court has changed with the retirement of Justice White and the appointment of Justice Ruth Bader Ginsberg.

In the meantime, I think that the guidance from the Court is, as I said, quite narrow. The allowance of public payment for speech interpreters can probably be broadened to mechanical devices designed to allow students with hearing impairments to access the curriculum but it surely cannot be broadened to include teaching personnel, classroom aides, or guidance counselors. So, at the moment at least, I don't think it suggests significant changes in the way you have been operating with the possible exception of the area of students with severe hearing impairments.

Now, Reed would be happy to answer any of your questions, and, of course, I will too should you happen to touch on a topic about which I know something!